No. 7012.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Lake Union Dry Dock & Machine Works,
Claimant and Appellant,
vs.
Wilmington Boat Works, Inc., a corporation,
Libellant and Appellee,
The Boat "Luddco 41," her engines, tackle, apparel, furniture, etc.,
Respondent.

Upon Appeal From the United States District Court for the Southern District of California, Central Division.

Honorable George Cosgrave, *Judge.*

BRIEF OF APPELLEE.

Lloyd S. Nix,
Office: 623 Title Insurance Building, Los Angeles, Calif.,
Proctor for Libellant and Appellee.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

The statement of the case set forth in appellant's brief is sufficiently accurate that the appellee will not burden the court with a similar statement.

Since the appellant has admitted in its brief that no issue is made in this court concerning the nature and amount of the work done upon the respondent boat by the appellee, no further mention of the same will be made in this brief.

STATEMENT OF FACTS.

The admitted or uncontroverted facts upon which appellee bases its case are as follows: The respondent boat was in the exclusive possession and under the control of the Yacht and Motor Sales Corporation in Wilmington, California, prior to the time the repairs were made thereon by the appellee. [Ap. p. 33.] Mr. Offutt and Mr. Wilson of the Yacht and Motor Sales Corporation brought the respondent boat to the appellee's place of business and ordered certain work to be done on the boat. They made arrangements with Mr. Carlson and Mr. Angelman, officers of the Wilmington Boat Works, appellee herein, regarding the work to be done on the boat. Mr. Offutt and Mr. Wilson were present nearly every day while the work was being done for the purpose of inspecting the same. [Ap. pp. 48, 49 and 50.] Mr. Offutt was the man who always ran the boat prior to the time the work was done on the same by the appellee. Prior to the time the repairs were made by the appellee, the respondent boat was extremely noisy in operation. The repairs were made to remedy this defective condition. [Ap. p. 51.] The Lake Union Dry Dock & Machine Works owned the hull of the respondent boat, but this fact was unknown to the appellee and could not have been ascertained by the appellee from the records of the Custom House in Los Angeles or San Pedro, California, since appellant admits that no record was made of its ownership of the hull until after the repairs on the boat had been completed by the appellee. [Ap. p. 70.] The understanding or agreement between the appellant and the Yacht and Motor Sales Corporation for the delivery of the respondent boat by the former to the latter was

oral and of course could not have been recorded anywhere. [Ap. p. 62.] The Yacht and Motor Sales Corporation furnished and installed the engine in the respondent boat, after the hull was delivered to them by the appellant.
after the hull was delivered to them by the appellant. [Ap. p. 92.]

The Yacht and Motor Sales Corporation was evidently an agreed purchaser of the respondent boat at the time it ordered the work done thereon by the appellee, since Mr. H. B. Jones, the secretary and attorney for the appellant, testified as follows:

> "* * * that as an initial payment on this boat the Yacht and Motor Sales Corporation was to deliver the power plant, which they obtained through being the representative of some engine manufacturer, to the Lake Union Dry Dock & Machine Works, *and it should become a part of the boat and constitute a payment on account of the purchase price of the boat.*" [Ap. p. 63.] (Italics ours.)

The Yacht and Motor Sales Corporation agreed orally with the appellant to keep the respondent boat in good shape by way of painting and varnishing, but there is positively no evidence to the effect that the Yacht and Motor Sales Corporation agreed to pay for any repairs of a substantial nature such as were made by the appellee. The utter absence of any such agreement or understanding is conclusively proved by the testimony of Mr. H. B. Jones, secretary and attorney for the appellant, as follows:

> "Q. Was it contemplated that anything of any substantial character would be required to be done to the vessels after their shipment to California? A. No; it was not expected that there would be any substantial work to be done on them. The expenses

> that we had in mind were insurance, taxes, warehousing expenses, if any, interest on the amount due the Lake Union Dry Dock & Machine Works, which they were to pay, and the necessary expenses of up-keep, which it was contemplated would be painting and cleaning and keeping up the boat in ordinary shape." [Ap. p. 64.]

To the same effect Mr. Otis Cutting, vice-president and treasurer of the appellant, testified as follows:

> "Q. Was it contemplated that any construction work or alteration work, or repairs, or anything of that kind, would be required for them in any particular when they were sent down there? A. No, sir; *no work of that kind was anticipated.*" [Ap. p. 73.]

Thus it is demonstrated that no agreement pertaining to such repairs existed since they were not anticipated.

Nowhere in the record can there be found any intimation that the appellant actually either orally or in writing forbade the Yacht and Motor Sales Corporation to incur liens upon the respondent boat for repairs of a substantial nature. Neither can there be found any evidence tending to show that the Yacht and Motor Sales Corporation ever agreed with the appellant or promised that they would not permit liens to attach by reason of such repairs.

That the Yacht and Motor Sales Corporation was an agreed purchaser in possession of the respondent boat at and prior to the time that the repairs were made thereon by the appellee, is again proved by the testimony of Harry C. Wilson, secretary and treasurer of the Yacht and

Motor Sales Corporation, called on behalf of the appellant who testified as follows:

"Q. How much were you to pay the Lake Union Dry Dock Company for the boat "LUDDCO 41"? A. That varied. The original deal, when the boat first came down here, we were supposed to pay them $15,000 for the hull. And they subsequently sent us new concessions, new prices.

Q. What was the second new price they sent you? A. They kept cutting on it until we finally bought the boat from them, including the motors, which we had sold, for $12,500.

* * * * * * * * * *

Q. When did you buy it for $12,500? A. After we came out of bankruptcy.

Q. About what time? A. In the summer of 1931.

Q. In the summer of 1931? A. Yes.

Q. You bought the "LUDDCO 41", is that right? A. That is right.

Q. Prior to the time that you had the "LUDDCO" —or, prior to the time the boat went on the dry docks at the Wilmington Boat Works, did you ever state to the Wilmington Boat Works that the boat could not be held for a lien for the payment of any work done?

Mr. Bronson: Objected to as not proper cross-examination. There is no testimony from this witness about any conversation about holding the boat.

A. I did not.

Q. The Yacht & Motor Sales had possession of the boat, is that right? A. Yes.

Q. That possession was delivered to them—the possession of the boat was delivered by the Lake Union Dry Docks; is that right? A. Yes.

Q. And after it had been delivered in your possession, you endeavored to sell the boat? A. Yes.

Q. Then you wanted certain work done on the boat and took it to the Wilmington Boat Works? A. That is right." [Ap. pp. 92 and 93.]

Thus we also see that the Yacht and Motor Sales Corporation was not only an agreed purchaser, but *did actually purchase the respondent boat after the repairs were made thereon.*

The Yacht and Motor Sales Corporation held themselves out to be the owners of the boat. This fact is substantiated as follows:

"To the Fifth Interrogatory. A statement of the complete work was sent to the Yacht & Motor Sales Corporation. We knew that the boat was in the possession of the Yacht & Motor Sales Corporation *and by their actions they held themselves out to be the owner of the said boat.*" [Ap. p. 33.]

The fact that nothing of a suspicious nature occurred which would cause the appellee to question the Yacht and Motor Sales Corporation's ownership of the boat and their authority to have the work done, is demonstrated as follows:

"To the Tenth Interrogatory. We were never informed by them that they were the owner, but as they were selling boats of this character and we were in the habit of performing work on any and all boats they sent to us, *we had no reason to question their ownership and their authority to have the work done.*" [Ap. pp. 33 and 34.]

The fact that the appellee did the work and made the repairs on the credit of the respondent boat is proved as follows:

> "To the Thirteenth Interrogatory. No, our work is always done at the credit of the boat." [Ap. p. 34.]

Reply to Summary of Facts.

The appellant in its brief under the heading "Summary of Facts" has made certain incorrect, inaccurate and misleading statements which must be clarified at this time.

Appellee has been unable to discover in all the testimony where the Yacht and Motor Sales Corporation has been proven to be or referred to as merely a Yacht Broker. The testimony on the contrary proves that the Yacht and Motor Sales Corporation was an agreed purchaser in possession of the boat, an owner *pro hac vice,* or at least was a person to whom the management of the boat at the port of supply was entrusted. It is not established by the evidence, except in the case of the boats built by the appellant, that the new boats in the possession of the Yacht and Motor Sales Corporation were not actually owned by it.

The fact that the appellee knew that the respondent boat was to be sold by the Yacht and Motor Sales Corporation after the repairs had been completed does not prove that the appellee made the repairs thereon on the sole credit of the Yacht and Motor Sales Corporation, since the lien of the appellee would follow the boat even into the hands of an innocent purchaser.

All of the evidence shows that all of the work done by appellee was in the nature of repair work and was necessary. The testimony of Mr. Wilson shows that the Yacht and Motor Sales Corporation, of which he was an officer, from time to time received statements for the sum of $713.83; that he intended to pay the same; that he never objected to the bill; and that he considered the amount reasonable. All of the testimony proves that the Yacht and Motor Sales Corporation had complete charge of the boat; that there was no written conditional sales contract on the same; that there was no charter party on the same; that there was no document on record in the Custom House showing title to be in any other person or corporation; and that it had full authority to do any and all things that it deemed necessary in and about the respondent boat. The testimony shows that the appellee made the repairs on the credit of the boat. Even though Mr. Wilson did agree to pay the account in full, there is not one iota of evidence tending to show that the appellee agreed to hold him solely and exclusively liable for such repairs and to release its lien upon the respondent boat

ARGUMENT.

We do not deem it necessary to again set forth sections 971, 972 and 973 of Title 46, U. S. C. A., which are set forth in the brief of appellant and which we concede to be controlling in this case. We will not even attempt to give the court our interpretation of these sections since we believe that the sections are correctly and fully interpreted in the cases which we will hereinafter set forth.

Reply to First Specification of Error.

Appellant contends in its first specification of error that the Yacht and Motor Sales Corporation did not come within the classification of persons presumed to have authority to create liens on boats.

Sections 971, 972 and 973 above referred to are commented upon in *Benedict on Admiralty,* Fifth Edition, Volume 1, beginning at page 143, as follows:

> "Sec. 88. By its terms, the Act of Congress supersedes the provisions of all state statutes conferring liens on vessels, in so far as such statutes purport to create rights of action to be enforced by suits *in rem* in admiralty against vessels for repairs, supplies, towage, use or dry dock or marine railway and other necessaries. Passed in restriction of the rights of vessel owners and in aid of those who furnish repairs, supplies and other necessaries, the act abolished the distinction between furnishing them upon the order of the owner or of the master, created a presumption of the vessel's liability when they are furnished upon the order of the persons designated by the Act and rendered it unnecessary to allege or prove that credit was given to the vessel."
>
> "Sec. 89. Under the Act of Congress it is not necessary to allege or prove that credit was given to the vessel. Prior to the Act, whatever was furnished to the vessel at the home port or on the owner's order was presumed to be furnished upon his personal credit and created no lien. The Act of Congress does more than declare the contrary presumption for, by force of the statute, the lien arises unless it is expressly agreed that the personal credit shall exclude the otherwise concurrent lien. The repair man or supply man may, however, by agreement or otherwise, waive

his lien, but such waiver must clearly appear and the claimant has the burden of proving it."

"Sec. 91. Under the Act of Congress, the managing owner, ship's husband, master or any person to whom the management of the vessel at the port of supply is entrusted is presumed to have authority from the owner to procure repairs, supplies, towage, use of dry dock or marine railway and other necessaries for the vessel, and such officers and agents of a vessel include those appointed by a charterer, by the owner *pro hac vice,* or by an agreed purchaser in possession of the vessel, but the Act does not confer a lien when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the ship's supplies or other necessaries was without authority to bind the vessel."

All of the testimony shows that the Yacht and Motor Sales Corporation was in possession of the respondent boat, operated the boat about the harbor and by its actions held itself out to be the owner thereof. The appellant does not even intimate that the Yacht and Motor Sales Corporation was unlawfully or tortiously in possession or charge of it. There were no papers on board the boat and neither was there any document on file at the Custom House or in the possession of the Yacht and Motor Sales Corporation which would serve as constructive notice that the Yacht and Motor Sales Corporation was not such a person as is presumed to have authority to create liens.

Under these facts, the following case is particularly enlightening:

"The Oceana"—233 Fed. 139 at 146.

"The purpose of the act was to remove by a plain and simple course of procedure the confusion into which the subject had become involved. Therefore it did away with the artificial distinction between foreign and domestic vessels; it removed the presumption of credit to the owner; it superseded the state statutes conferring liens for necessaries; and it resolved the conflict of authority over the distinction between charterers and agreed purchasers in possession. Accordingly, the act gives a lien when supplies are furnished to a vessel upon the order of the owner or of any one authorized by him. It specifies that any person to whom the management of the vessel at the port of supply shall have been entrusted shall be presumed to have been so authorized. *If the materialman knows nothing about the authority of the person in possession of the ship, except that he is managing it, he may furnish the supplies, and the ship will be bound for them.* But he may know more. Consequently the proviso. But before this proviso can have any application something must have occurred to put the furnisher of the supplies upon inquiry. As Judge Rose pointed out in the City of Milford (D. C.) 199 Fed. 956:

'It is to be understood in such sense as will harmonize it with the general purpose of the act. That purpose was to make the management of a vessel as its port of supply presumptive evidence of the right to bind it for supplies there furnished. That purpose prevails unless it shall be shown that the person so managing the vessel was *unlawfully* or *tortiously* in possession or charge of it, or unless something has been brought to the knowledge or attention of the person furnishing the supplies which in honesty and good conscience puts upon him the duty of inquiry as

to whether the person who has the management of the ship has the right to pledge its credit.'

The act does not mean that the furnisher shall not have the right to rely upon the authority to bind the vessel presumed to exist in the officers and agents specified in the second section. It is only when he knows that such officers or agents do not have the requisite authority, or under the circumstances is put upon inquiry to their powers, that the presumption becomes inoperative. There must be an actual restriction of authority by the owner in the first place, and in the absence of affirmative knowledge of such restriction, or of circumstances which ought to raise a doubt in his mind, the furnisher is entitled to rely upon the presumption and will acquire a lien, even if the officer or agent in fact has no authority." (Italics ours.)

The Yacht and Motor Sales Corporation was clearly entrusted with the management of the boat since it had been operating the same in and about the harbor for sometime prior to the making of the repairs thereon by the appellee. Even though it were considered an agreed purchaser in possession, the possession which it had was sufficient under the following definition:

"The Oceana"—233 Fed. 139 at 148.

"I am unable to agree with this ruling by the special commissioner. It is unfortunate that section 2 of the Lien Act employs the terms "managing owner, ship's husband, master or any person to whom the management of the vessel is intrusted," to enumerate the functionaries who are readily reducible to and are described in section 3 as "officers and agents." It is clear, however, that under the act any person to whom an owner intrusts the management of his ship may

> create liens, but that an agreed purchaser of a ship can only appoint such an agent when he is in possession of the ship. Where there is nothing to limit the term, *possession may be either actual or constructive; and I incline to the opinion that it is so employed in this act.* From this point of view, and with respect to the matter of supplies and equipment here involved, it would be quite in accord with the evidence to regard the vessel as having been legally in the possession of the vendee from the date of the first payment on the purchase price. That is, possession might well be construed to mean the intended right to enjoy the property."

The case of *"The Ark,"* 17 Fed. (2nd) 446, holds that although parties held a boat under a lease from its owner which provided that all repairs and changes were to be made at the cost of the parties to whom possession was delivered, still the libelants who did certain work and furnished materials on the vessel on the orders of the persons so lawfully in possession thereof were entitled to maritime liens therefor in the absence of knowledge of the terms of the lease. In that case, as in the instant case, there was no express agreement by those in possession that they would not allow liens to attach to the vessel. The court, on page 448, states as follows:

> "The next question to be decided is: Have the libelant and interveners maritime liens for such work, labor, and materials as they may show by the testimony that they performed and furnished? The decision of this question depends upon the language of the Act of Congress passed June 23, 1910 (chapter 373 (sections 7783-7787, Comp. Statutes.)). Section 1 of the act (Comp. St. 7783), reenacted as subsec-

tion P of the Ship Mortgage Act of 1920 (Fed. Stat. Ann. 1920, p. 257), being Comp. St. 8146¼000, reads as follows: * * *

> The testimony shows in this case that the libelant and A. J. Yarber and Nat Eastman, interveners, did certain work and furnished materials on the vessel on the orders of the persons lawfully in possession thereof. Their lien for the value of the same exists by virtue of the act, unless they knew, or by the exercise of due diligence could have ascertained, that the persons were without authority to bind the vessel. The testimony leaves no doubt in my mind on this part of the case."

The appellant urges that the boat was not under the "management" of the Yacht and Motor Sales Corporation. The appellant evidently believes that management involves only long cruises. The facts show clearly that the respondent boat was in the exclusive possession and control of the Yacht and Motor Sales Corporation and that its agent, Mr. Offutt, had been running the boat for some time; that it was intrusted with the exclusive possession, control and operation of the boat. No court has given the word "management" such a limited meaning to our knowledge as that which appellant urges. The rule of the presumption of authority was laid down in the case of *"The Anna E. Morse,"* 286 Fed. 794 at 797, without even using the word "management," as follows:

> "Thus speaking broadly, the law presumes the owner's authority in one *entrusted with a ship* to procure supplies on the pledge of the ship, unless the owner has withheld his authority and the furnisher knew it or by diligence could have ascertained it." (Italics ours.)

We therefore maintain that the commissioner and the trial court were justified in finding and concluding that the Yacht and Motor Sales Corporation came within the classification of persons presumed to have authority from the owner sufficient to support the creation of liens.

Reply to Second Specification of Error.

Appellant contends that appellee "well knew that this and the other vessels in the possession of the Yacht and Motor Sales Corporation were in the possession of the latter *solely* for the purpose of sale to purchasers." We have been unable to discover any evidence in the case tending to show that such possession was *solely* for the purpose of sale. It is true that the corporation sold boats, but appellee reasonably presumed from all of the facts coming to its knowledge that the Yacht and Motor Sales Corporation owned these boats, or at least had authority to create liens on them for necessary repairs and supplies.

The argument advanced by appellant regarding an innocent purchaser is entirely imaginative since no innocent purchaser is involved in this case, and as a matter of fact, the Yacht and Motor Sales Corporation, which ordered the work, subsequently purchased the respondent boat from the appellant.

The appellant objects to the finding and conclusion of the court "that there was nothing which should have put the libelant on inquiry and that libelant acted with reasonable diligence, although making no inquiry whatsoever." The case of *"The Oceana,"* 244 Fed. 80, was one in which the Bermuda Company had work and repairs made to the ship by the libelants. The records of the

Custom House showed the Morse Company to be the owners of the ship, and that the Bermuda Company had no authority to create liens. The libelants made no inquiry whatsoever. The court, on page 82 held as follows:

> "Obviously the act was passed in restriction of the rights of vessel owners and in the aid of those who furnish repairs, supplies, and other necessaries. It wiped out all difference between foreign and domestic vessels, and between repairs, supplies, and other necessaries furnished in the home port, as distinguished from those furnished in foreign ports, and between such as were ordered by the master and such as were ordered by the owners. It created a presumption of law of the vessel's liability for all repairs, supplies, and other necessaries ordered by the master, managing owner, ship's husband, charterer, any person to whom the management of the vessel is intrusted at the port of supply, owner *pro hac vice*, and conditional vendee. There is an exception in favor of the vessel owner, relied upon by the claimant in this suit, in the case of repairs, supplies, or other necessaries ordered by a charterer or conditional vendee, who has no authority to bind the vessel, provided the repair and supply men knew, or ought with reasonable diligence to have learned, that the charter or conditional agreement of sale deprived the charterer or vendee of this authority.
>
> While it is true that an examination of the records of the custom house at this port would have disclosed the fact that the Morse Company, and not the Bermuda Company, was the owner of the steamer, knowledge of which fact would require the libelants to make further inquiry, *we do not see any ground for holding that reasonable diligence required them to make any such search.* They were entitled to a lien

without giving credit to the vessel, and *they were entitled to treat those intrusted with her management as authorized to order repairs, supplies, and other necessaries which would be secured by such a lien.* It lay upon the claimant to show some fact or circumstance which would have put these libelants on inquiry, and it has not done so. This is the view taken by Judge Rose in The City of Milford (D. C.), 199 Fed. 956, and by the Circuit Court of Appeals for the Third Circuit in the case of The Yankee, 233 Fed. 919, 147 C. C. A. 593." (Italics ours.)

To the same effect see:

The Morse Dry Dock & Repair Co. v. U. S.—298 Fed. 153.

Thus we see that the appellee is entitled to a lien on the respondent boat unless the appellant can show some fact or circumstance which should have put the appellee on inquiry, and the burden of proving such facts is upon the appellant. This, as in the case last cited, has not been done.

Another case in which the libelant made no inquiry as to the authority of the person in possession of the boat to bind it for repairs and necessaries, is that of *"The Portland,"* 273 Fed. 401, in which case the court held that the libelant had a lien even though the person in possession had agreed with the owner to pay for fuel oil, but no provision was made that he should be without authority to bind the vessel therefor. The court, on page 404, holds as follows:

"It is said that the charter party gave the charterer no right to impose a lien on the vessel for fuel to be furnished for two reasons: One, because the charter

obligation to provide fuel was on the charterer; another, because the only lien upon the ship given to the charterer by the charter party was a lien for moneys advanced and not earned. But an examination of the charter party fails to disclose that the master or charterer had not authority to bind the vessel for supplies of fuel at distant ports. There are no words prohibiting persons enumerated in section 2 of the Act of Congress from binding the vessel for necessary things. *We think that a charter party with a provision that charterer shall provide and pay for fuel oil does not take away from the master the authority conferred by the act upon the master to bind the ship. It regulates the rights as between owner and charterer; but as to third persons the right of lien is not affected.* In The South Coast (D. C.) 233 Fed. 327, Judge Dooling very clearly enunciated that in a charter party requiring charterer to pay expenses incurred in operating as well as for supplies furnished the vessel, it is an essential precaution for the owners to provide by the terms of the charter that the charterer or the master appointed by him, should be without authority to bind the vessel therefor. This court affirmed that view in The South Coast, 247 Fed. 84, 159 C. C. A. 302, and the ruling was affirmed by the Supreme Court in The South Coast, 251 U. S. 519, 40 Sup. Ct. 233 64 L. Ed. 386.

Distinction between that case and this is said to exist because in The South Coast the charter party recognized that liens might be imposed by the charterer, whereas here there is no such recognition, but, on the contrary, there are provisions which negative the right of the charterer to impose a lien "for the purpose of procuring" fuel oil. Among the provisions of the charter party under consideration are: That

charterer shall provide and pay for fuel; that charterer shall pay for use of vessel regardless of whether she moves or not or whether she is supplied with fuel or not; that charterer shall have a lien "on the ship for all moneys paid in advance and not earned." But the charter party in The South Coast required charterer to provide and pay for supplies as well as operating expenses of the vessel. Nor does the provision giving a lien on the ship for all moneys paid in advance and not earned affect the similarity of the cases, as the lien referred to in the case before us is one given by the owners to the charterers, not one given by the charterers to third persons.

The real ground for the ruling in The South Coast was that the supplies were furnished on orders from the master, and the master had the owner to impose a lien unless the charter party excluded the possession of such power. Some of the cases cited by the appellant are to the effect that one knowing that he is dealing with a charterer is put on inquiry as to the terms of the charter perty. The Oceana (D. C.) 233 Fed. 139; Id., 244 Fed. 80, 156 C. C. A. 508; The Castor, 267 Fed. 608. That rule can be accepted without disturbance of the authority of The South Coast for holding that, libelant delivered supplies upon the master's orders, and the master having been authorized to order suppiles for the vessel, and there being no clause in the charter which in any way prohibited the master from exercising such authority, it has a lien which has not been defeated." (Italics ours.)

Another case in which no inquiry was made as to the authority of the person in possession of the boat, is the case of *"The Hammond,"* 17 Fed. (2nd) 118, where the court holds on page 119 as follows:

"The question made by the exceptions depends on the construction of the contract of charter, copy of which is made a part of the answers. Officers and agents of a vessel bind the vessel for necessaries, when appointed by the charterer or an owner *pro hac vice,* unless the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale, or for any other reason, the person ordering the necessaries was without authority to bind the vessel.

The decision of the question here involved hinges on whether the agreement denied the right of the charterer to pledge the credit of the vessel for necessaries furnished. The agreement unquestionably contemplated that the charterer should pay for towage, for watching, wharfage, supplies, etc., that might become a lien, but contains no inhibition on the charterer placing liens for necessaries upon the vessel. This, as I understand the cases, is not sufficient to deprive the furnisher of the maritime lien given by the statute, where the same are furnished without knowledge of the character of the possession of the vessel."

Thus we see that merely lack of authority to bind the vessel or an agreement to pay for repairs are not the controlling factors, but that the actual inhibition on the person in possession to incur liens is the test. The court in the case of *U. S. v. Carver,* 67 L. Ed. 361, cited by appellant, together with all of the other cases cited by appellant on this same point, refer to such an actual inhibition which the materialman could have discovered by investigation with reasonable diligence. These cases do not, however, hold that in the absence of such an inhibition that the

materialman is not entitled to his lien since he made no inquiry.

The answer to the Tenth Interrogatory demonstrates that no fact or circumstance existed which would require appellee to inquire as to the authority of the Yacht and Motor Sales Corporation in the exercise of reasonable diligence. It is as follows:

> "We were never informed by them that they were the owners, but as they were selling boats of this character and we were in the habit of performing work on any and all boats they sent to us, *we had no reason to question their ownership and their authority to have the work done.*"

Surely the appellee must be considered to have exercised reasonable diligence since they had been doing work on boats controlled and operated by the Yacht and Motor Sales Corporation which they supposed owned the boats. "Due diligence in ascertaining the authority of one ordering supplies for a vessel, which is necessary before a maritime lien can be secured on the vessel, is largely a question of fact depending on the particular circumstances of each case." *"The Louis Dolive"*—236 Fed. 279.

The case of *"The Bethlehem"*—4 Fed. (2d) 308, was a case wherein the shipping board sold a vessel to the West India Navigation Company, taking back a mortgage wherein it was provided that the Navigation Company should not incur liens of any kind. Although these mortgages were recorded with the Custom House at Baltimore, the court held that since the ship's papers contained

no such inhibition, that the furnisher of supplies and repairs was entitled to a maritime lien, although he made no inquiry whatsoever. In discussing what is reasonable diligence, the court, on page 311, says:

> "We do not believe the statute, in demanding of the furnisher 'the exercise of reasonable diligence' in ascertaining the owner's authority to bind the ship, intends by the word 'reasonable' that the furnisher shall in every instance make an investigation complete in all details, even to visiting the home port and searching the title of the ship. We are lead to this conclusion because otherwise the Act of 1910, the forerunner of the Act of 1920, *which was enacted to relieve furnishers from the vigor of the law as it then existed, as well as to facilitate navigation, would be ineffective and purposeless.* We are therefore of opinion that if the libelants in these cases had with reasonable diligence made the investigation which the law required of them, they would have discovered nothing that would have withdrawn from them the presumption of the owner's authority given by a preceding section of the act." (Italics ours.)

Thus it is apparent that appellee was under no duty to inquire, since there was no document or evidence of any sort on file at the Custom House or in existence which would have informed it of any inhibition or lack of authority in the Yacht and Motor Sales Corporation to create liens.

The appellant, in making its claim of "substitute original construction" on page 34 of its brief, had evidently forgotten its admission on page 4 that no issue was made in this court on that point. We therefore deem it unnecessary to answer such statement.

Reply to Third Specification of Error.

The appellant states that it was expressly agreed that the Yacht and Motor Sales Corporation could not create liens on the boat. We have searched the record, but have been unable to find one iota of evidence to support such a claim. Surely such a fact was not seriously called to the attention of the commissioner and the trial court or they would never have made the direct finding that there was no evidence of a specific agreement to this effect. Surely the oral agreement between the parties as to which was to bear the expense of painting, etc. did not exclude the usual authority possessed by a person in possession of a vessel to use the credit of the vessel for its benefit. Surely such an indefinite oral understanding could not be binding upon a furnisher of repairs who had no knowledge of the same. The commissioner, after hearing all of the evidence in the case, concluded and found that there was no specific agreement between the claimant and the Yacht and Motor Sales Corporation that the latter could create no liens. This conclusion and finding was approved and adopted by the trial court.

Appellant contends at some length that the Yacht and Motor Sales Corporation had no authority to incur liens on the boat, and that it was not within the contemplation of the parties that any work would be required to be done to the boat. This we concede, but since the repairs made by appellee were neither contemplated by the parties, nor was there any evidence of a provision in the agreement withholding authority to create liens, it is logical to conclude that there was no such provision withholding authority to create liens.

The case of *"The Henry W. Breyer,"* 17 Fed. (2nd) 423, was very extensively quoted from by appellant and evidently heavily relied upon. The statements quoted therefrom, however, by appellant regarding reasonable diligence should be read, together with the following paragraph, however, which the appellant neglected to quote. The court in that case on page 427, just after the language quoted by appellant, states as follows:

> "It was not only easily possible for Baker, Carver and Marrell to have discovered the true relationship of the navigation corporation to the ship, *but the preponderance of the evidence indicates that they did discover it.*" (Italics ours.)

It will thus be observed, therefore, that the decision in that case was based more upon the fact that the libelants *actually discovered* the inhibition upon incurring liens on the boat, than upon their lack of due diligence in failing to inquire.

Appellant contends that since appellee charged the items here in controversy to the Yacht and Motor Sales Corporation that it thereby lost its lien on the boat. We will answer this contention briefly and decisively by merely citing *"El Amigo,"* 285 Fed. 868, where the court holds as follows on page 870:

> "Where necessaries are furnished to a vessel under the circumstances giving rise to a lien on it, the furnisher's right to the lien is not affected by his charging the price against the person on whose orders he acted."

Since there is no evidence to the effect that there was a provision in the agreement or understanding between

the appellant and the Yacht and Motor Sales Corporation withholding the authority to create liens and neither was there a direct inhibition upon the latter, the case of *"The Anna E. Morse,"* 286 Fed. 794, seems to be directly in point, for even though no inquiry was made, the libellant can at worst be bound merely by what it would have discovered had it made inquiry. The court on page 798 bears out this contention as follows:

> "In searching this contract for lack of authority on the part of the Transport Company to procure supplies on the credit of ships assigned to it, the libellants *would have found no provision whereby the United States, as owner, had withheld authority from the Transport Company to procure supplies for the ships it had entrusted to its management.* Therefore, at this state the Transport Company remained vested with authority presumed by the law to order supplies upon the credit of the ships, Act of June 5, 1920, 30, subsections Q and R, 41 Stat. 1005; The South Coast, 251 U. S. 519, 40 Sup. Ct. 233, 64 L. Ed. 386; The Bronx, 246 Fed. 809, 159 C. C. A. 111; The Dana (D. C.) 271 Fed. 356; and the libellants had a right to furnish the supplies upon the credit of the ships—if the ships for which the supplies were furnished were actually of the number assigned, or to be assigned, under the contract." (Italics ours.)

The evidence shows no circumstance which would suggest inquiry, and the appellee did not close his eyes to any such circumstance. All of the evidence and the findings and conclusions of the commissioner and the trial court bear out this contention.

The case of "The South Coast," 40 Sup. Ct. Rep. 233, is a very learned opinion written by Justice Holmes. In that case, as in the instant case, no inquiry was made. Also no direct inhibition was contained in the charter. The court states as follows:

> "The statute had given a lien for supplies in a domestic port and therefore had made that one of these ordinary liens. Therefore the charterer was assumed to have power to authorize the master to impose a lien in a domestic port, and if the assumption expressed in words was not equivalent to a grant of power, *at least it cannot be taken to have excluded it. There was nothing from which the furnisher could have ascertained that the master did not have power to bind the ship.*" (Italics ours.)

We therefore submit that the commissioner and the trial court were perfectly justified in finding and concluding from all of the evidence and the law that there was no agreement between the claimant and the Yacht and Motor Sales Corporation that the latter could create no liens. The agreement between the parties, as to which was to bear the expense of repairs, did not exclude the usual authority possessed by a person in possession of a vessel to use the credit of the vessel for its benefit. The agreement between the owner and the person in possession under charter or contract fixes their respective rights and obligations but is not binding upon third parties. "The Portland," 273 Fed. 401. "The Anna E. Morse," 286 Fed. 794.

Reply to the Fourth, Fifth, Sixth and Seventh Specifications of Error.

Since appellant does not deem these specifications of error of sufficient importance to argue the same, we also are perfectly willing to rest the case upon the evidence, law and arguments heretofore advanced.

We therefore earnestly urge that the commissioner and the trial court committed no error and that this court should affirm the findings, conclusions and decree of the trial court in all respects.

Respectfully submitted,

Lloyd S. Nix,

Proctor for Libellant and Appellee.